

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANTS**

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Joseph W. Stewart

CLERK

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8537

96

MILTON E. GROOME, ET AL,

Appellants

vs.

GILLARD J. STEWARD

Appellee

On Appeal from the United States District Court
for the District of Columbia

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BRIEF FOR APPELLANTS

JURISDICTION

The relief prayed for under the bill of complaint filed

herein on the 25th day of January, 1941 is based upon an absolute equitable cause of action to quiet title to land under the provisions of Section 1501, Title 16 of the District of Columbia Code; and jurisdiction of a Court of Equity for the District of Columbia of the cause of action stated is invoked under the provisions of Section 325, Title 11, of the District of Columbia Code (App. pp. 2 and 3).

A declaratory judgment of fee simple title in appellee to the land in question was entered on January 27, 1943 (App. p. 12); and after motions (1) to vacate findings of fact and judgment, (2) for the entry of judgment dismissing bill of complaint, and (3) for a new trial presented by appellants were overruled on April 17, 1943, notice of appeal was filed (see supplement to transcript of record, App. p. 9).

NATURE OF CASE

An equitable cause of action to have title to land declared to be vested in the appellee by adverse possession as provided by Section 1501, Title 16 of the District of Columbia Code.

STATEMENT OF CASE

The findings of fact are to the effect that when appellee acquired title to a lot or parcel of land described as Lot 22 in Square 4045 of the District of Columbia, the record title holder of said Lot 22 and the adjoining lot—being Lot 16 in said square—pointed out to appellee that the part of Lot 16 enclosed by a fence and shed was a part of Lot 22, and the appellee, believing that Lot 22 included the portion of Lot 16 enclosed by a fence and shed, has occupied the same as his own. (App. p. 10).

The findings of fact also state that at or about the time

the bill of complaint was filed the defendants entered upon Lot 16 in Square 4045, tore down the shed and fence for the purpose of improving said Lot 16, and have subsequently built an apartment house on said Lot 16 (App. p. 11).

The conclusions of law state that appellee is entitled to a decree for adverse possession of a part of Lot 16—consisting of some 378 square feet of the northeast corner thereof—and the appellants in entering upon the same *were trespassers* (App. p. 11).

There are no findings of fact that any one is the record title holder of Lot 16, except Chauncey I. Withrow; and so far as the decree purports to declare title to land in appellee by adverse possession, it runs only against persons who are characterized as *trespassers* by the conclusions of law (App. pp. 11 and 12).

STATUTES AND RULES INVOLVED

The bill of complaint specifically states that the suit herein is brought under the provisions of Section 1501, Title 16 of the District of Columbia Code; and the jurisdiction of the Court is invoked as a Court of Equity as prescribed by Section 325, Title 11 of said Code.

Said two Sections of the Code read as follows:

“When title to any real estate in the District of Columbia shall have become vested in any person or persons by adverse possession, the holder thereof may file a bill in the District Court of the United States for the District of Columbia to have such title perfected, in which bill it shall be sufficient to allege that the complainant holds the title to such real estate, and that the same has vested in him, or in himself and in those under whom he claims, by adverse possession; and in such action it shall not be necessary to make any person a party defendant except such persons as

may appear to have a claim or title adverse to that of the complainant. Upon the trial of such cause, proof of the facts showing title in the complainant by adverse possession shall entitle him to a decree of the Court declaring his title by adverse possession, and a copy of such decree may be entered of record in the office of the Recorder of Deeds for said District. In any such action if process shall be returned not to be found, notice by publication may be substituted as in case of nonresident defendants. If in any case it shall be unknown whether one who, if living, would be an adverse party is living or dead, or in the case of a decedent, whether he died testate or left heirs, or his heirs or devisees are unknown, the cause may be proceeded with under the provisions of Section 13-113: *Provided* That the rights of infants or others under legal disability shall be saved for a period of two years after the removal of their disabilities; *provided, however*, That the entire period during which such rights shall be preserved shall not exceed twenty-two years from the time such rights accrued, either in said complainant or in the person or persons under whom he claims. (Mar. 3, 1901, 31 Stat. 1207, ch. 854 Par. 111; June 30, 1902, 32 Stat. 524. ch. 1329)."

"The Equity Court shall have jurisdiction of all causes heretofore cognizable in equity and of all petitions for divorce, except where the relief sought is hereby authorized to be given by the Probate Court only, and shall have the special powers herein provided. And the practice in said Court shall be according to the established course of Equity and procedure and the rules established by said District Court of the United States for the District, not inconsistent with law. (Mar. 3, 1901, 31 Stat. 1202, ch. 854, Par. 85)."

The substantive provisions of Section 384, Title 28, USCA, control the exercise of equitable jurisdiction by a District Court of the United States in this proceeding,

when the proof develops that appellee has a plain, adequate and complete remedy at law.

Section 384, Title 28, USCA, reads as follows:

“Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. Par. 723; Mar. 3, 1911, c. 231, Par. 267, 36 Stat. 1163.)”

Rule 2 of the Federal Rules of Civil Procedure provides:

“There shall be one form of action to be known as ‘civil action’.”

POINTS RELIED UPON BY APPELLANTS

1. The occupancy by appellee of land not described in his deed for an adjoining lot, but used by him in the same manner it was used by a former tenant of the record title holder of both parcels of land, is that of a licensee of the title holder at the time such occupancy was commenced; and the evidence submitted by appellee with respect to such use fails to show that the former record title holder of said two parcels of land was ever, or at any time before the suit herein was commenced, given notice by appellee of his alleged adverse claim of title to land not described in his deed for the adjoining lot.

2. The appellee has commenced and prosecuted an absolute cause of action in equity under the provisions of Section 1501, Title 16 of the District of Columbia Code; whereas, the evidence submitted on behalf of appellee shows conclusively that the only cause of action he possessed against appellants, or anyone else, as the adverse claimant of title to the land in question was an essential cause of action at law in ejectment under the provisions

of Section 501 et seq., Title 16 of the District of Columbia Code.

3. The appellee having elected to commence and prosecute an absolute nonjury cause of action under the provisions of Section 1501, Title 16 of the District of Columbia Code; and having invoked the jurisdiction of a Court of Equity for the District of Columbia to render a declaratory judgment in said cause of action, has made it impossible for the Trial Court to adjudge fee simple title in the land to appellee, because of the evidence submitted by appellee and the substantive provisions of Section 384, Title 28, USCA.

4. The Trial Court has made findings of fact which fail to show, contrary to the admitted facts, that the record title to said land was vested in appellants when the suit herein was commenced; and the declaratory judgment entered of fee simple title to said land in appellee means nothing, unless the actual possession and occupancy of said land by appellants under their admitted legal title to said land may be properly and constitutionally invaded by injunctive process issued by a Federal Court of Equity.

5. By entry of the declaratory judgment herein for title to land by adverse possession, as provided by Section 1501, Title 16 of the District of Columbia Code, the Trial Court has abused its discretion with respect to the power of a Court of Equity to enter a declaratory judgment to quiet title to land in the District of Columbia under said Section of the Code; and because of such abuse of discretion, the substantive provisions of Section 384, Title 28 USCA, as a restraint upon the jurisdiction of a Court of Equity of the United States, have been violated.

6. The findings of fact and conclusions of law made are not responsive to the equitable cause of action alleged in the bill of complaint for a declaratory judgment under the provisions of Section 1501, Title 16 of the Code; and fur-

thermore they fail to afford a sufficient basis for an interpretation of the decree for declaratory judgment purported to be rendered thereunder by a Federal Court of Equity.

7. In so far as the conclusions of law made are responsive to the findings of fact, the cause of action adjudged thereby is one of "common trespass" of which a Municipal Court for the District of Columbia has exclusive jurisdiction under the provisions of Section 703 as extended by Section 704, title 11, of the District of Columbia Code.

8. The decree entered herein should be reversed and the equitable suit prosecuted by the appellee under the provisions of Section 1501, Title 16 of the District of Columbia Code dismissed under the motions made by appellants during the course of the trial of the case.

9. The appellee having failed to make out an adequate cause of action in equity under the provisions of Section 1501, Title 16 of the District of Columbia Code for a declaratory judgment of title to land by adverse possession, as prayed for in the bill of complaint, the jurisdiction of the Court below was limited to a dismissal of the suit under the substantive provisions of Section 384, Title 28 USCA.

SUMMARY OF ARGUMENT

1. The appellee's possession and occupancy of the land in question is not inconsistent with that of a licensee of the record title holder when such possession and occupancy commenced.

2. The substantive provisions of Section 384, Title 28 USCA are binding upon the jurisdiction of a Court of Equity of the United States for the District of Columbia notwithstanding the procedural provisions of that Section are changed in some respects by Rule 2 of the Federal Rules of Civil Procedure.

3. In the exercise of its powers to enter a declaratory

judgment under the provisions of Section 1501, Title 16 of the District of Columbia Code, a Court of Equity of the United States for the District of Columbia must exercise sound discretion so as not to invade or infringe the Constitutional rights of the adverse claimant, when the proof submitted in the equitable cause of action under the Code shows that the record title holders of the land in question were in the actual possession thereof when the equitable cause of action was commenced; and remained in the actual possession thereof at the time the equitable cause of action is tried.

ARGUMENT

I

The possession and occupancy by appellee of the strip of land in question is that of a mere licensee of the record title owner.

The findings show that when appellee acquired Lot 22 in Square 4045, as shown by the Plat of said square made an exhibit to the findings, that Chauncey I. Withrow as the record title owner of both Lot 22 and Lot 16 of said Square 4045 had permitted a previous occupant of Lot 22 to use a shed on Lot 16. Lot 22 was improved with a dwelling house, but Lot 16 was vacant property. The appellee has not shown that his use of a shed on Lot 16 was different from the use thereof by a *former tenant* of the title holder of Lot 22. The findings fail to show that the use of the shed on Lot 16 by appellee ever became hostile to Chauncey I. Withrow, as the title holder of Lot 16.

The findings of fact purport to base the alleged adverse

possession of appellee to the strip of land in question upon the facts—

That the plaintiff had no title search or survey made of the aforementioned premises prior to the time of or after the purchase of the premises; that at the time the seller, Chauncey I. Withrow, showed the property to the plaintiff, he pointed out and told the plaintiff that the premises included the rear portion which then had a fence around it and also a large shed; that the plaintiff understood and believed that at the time he purchased said premises as aforesaid, that it included the portion enclosed by a fence and shed as is set forth in plaintiff's exhibit 2, which is attached hereto and made a part hereof; that the plaintiff occupied as his own and used the same as his own on or before November 1, 1920, all of that land enclosed within the aforementioned fence and shed comprising all of lot 22 in square 4045 and a part of lot OF-16 of square 4045, as per the plat attached hereto and among the land records of the District of Columbia and which part of Lot OF-16, Square 4045 is described more particularly as follows:

Part of Lot 16, as recorded in Surveyor's Office for the District of Columbia in Book Levy Court 2, page 76; being part of Lot 816 as per the Assessor's Record of the District of Columbia, Beginning for the same in the Northeasterly line of said Lot 16 at a point which is 15.0 feet, Northwesterly from the Northwesterly line of West Virginia Avenue 88.0 feet wide, and running thence with said Northeasterly line of Lot 16, Northwesterly 21.0 feet to the most Easterly corner of Lot 22 in Square 4045 thence with the Southeasterly line of Lot 22, Southwesterly 18.0 feet thence parallel to the Northeasterly line of Lot 16, Southeasterly 21.4 feet, thence parallel to West Virginia Avenue, Northeasterly 18.0 feet to point of beginning. (App. p. 10).

The foregoing findings do not square with the testimony of appellee with respect to his understanding, viz:

I have lived there constantly since I went there. I live there now. I have lived there since 1920 down to the present time. I always kept my fence up and where it looked like it would get weak—always kept that fence repaired the same as new. The fence has been there during all the years I have occupied the place. There is another portion they put a line through; but my fence was there until they tore it down. This company that done the building there tore my fence down. I don't know who they were; but the company that done the building was the one that tore it down. They took the shed and moved that away. I was away from home when they moved the shed away. They moved the fence and damaged the shed and taken it away while I was up there on Georgia Avenue at work; and my son calls me up and asks me did I know they had cut up your yard in two, in the back, and they had cut it in two, and was taking it away. So, when I had a chance I slipped back there and they had moved the shed away. When I work sometimes I would be away a week, three or four days. I believe the property was mine. I bought it for mine and I know it is mine. I learned about the fence being torn down through my son calling me up. That was shortly before this suit was filed. I learned they come in there and cut my fence down and put these buildings there, and so when I saw what they done I went to see the lawyer, and I told him and asked him if they could take any steps for to stop him. After they cut my fence down after I learned that I went to the lawyer.

I have never admitted any other claims against it. I know it was mine.

(At this place the witness was shown a Plat of Square 4045, of Lots 16, 17, 18, 19, 20, 21 and 22 on which he indicated that part of Lot 16 on which he had maintained a fence and a shed.)

I claim as mine all of the property which is repre-

sented by Lot 22, and that portion of Lot 16 which is included within the red line on the Plat, which is Plaintiff's Exhibit No. 2.

CROSS-EXAMINATION

* * *

I paid \$1100 for that lot. It had a house on it.

The fence which began at my shed runs all the way across to Central Avenue. The fence there now runs between my lot and Lot 16. That is, between my lot and the shed. The fence they have got there now is not where it used to be. The other fence came all the way across. This new fence goes all the way across too. It was built when they put in the new building. About two years ago or something like that, as near as I can guess it, when they put that building there. Before then here was the fence (indicating on the Plat). The fence lines went on across to Central Avenue then. These other lots (indicating Lots 19, 20 and 21 on the Plat) had sheds all along there on up to the corner. All four houses there (indicating the houses on Lots 19, 20, 21 and 22) when I bought this house (indicating Lot 22 on the Plat) all had sheds across there. Chauncey I. Withrow owned all that property before I bought. I considered I was buying from Capital Avenue to West Virginia Avenue. I did not read my deed. I did not look at a Plat. He gave me a deed. I don't know anything about how much the deed had on it but I understood plainly that I was buying from West Virginia Avenue to Capital Avenue. That was my understanding. I wanted it for chickens, for anything, for the children, anything. I wanted to have a place, a back place, for them to play in there; and also to park cars like I had them in there. (App. pp. 13, 14 and 15).

There is substantial testimony of the fact that appellee disclaimed ownership of any part of Lot 16 prior to the

commencement of the suit herein (App. pp. 21, 22, 23, 24 and 25); and in view of the fact that appellee's title should be perfected to only so much of Lot 16 that *he understood* he was getting as a part of Lot 22, there is no evidence to support the foregoing finding that appellee's possession of the shed on Lot 16 was hostile to the record title holder. (See *Holtzman vs. Douglas*, 168 U. S. 278, 42 L. Ed. 466). The appellee's "understanding" was not limited to that part of Lot 16 described in the findings of fact; and there is no evidence to support the findings with respect to the "understanding of the appellee" as stated therein. The trial court should not make a finding that is in direct conflict with the positive testimony of the appellee. The evidence that appellee disclaimed ownership of any part of Lot 16 is substantial, and preponderates against the finding of adverse possession.

A decree of title by adverse possession under the provisions of Section 1501, Title 16 of the District of Columbia Code, must not only be supported by a finding that the appellee's possession of the property has been sufficiently adverse for the requisite number of years; but the findings of fact must show that the record title holder is out of the *actual possession* of the property (see *Sharon vs. Tucker*, 144 U. S. 533; *Johnson vs. Thomas*, 23 App. D. C. 141; and *Myers vs. Mayhew*, 32 App. D. C. 205).

The conclusions of law made under the findings of fact "that the appellants were in the actual possession of Lot 16 at the time the bill of complaint was filed" purports to dispose of such possession of the property by the appellants by the statement that "when the appellants entered into the possession of the property they were trespassers." (App. p. 11).

The conclusions of law made in this proceeding erroneously assume that the mere claim of title to the land by appellee is sufficient to sustain the bill under the provisions

of Section 1501, Title 16 of the District of Columbia Code; and where the person who claims such title delays bringing his suit after the cause of action accrues, until his possession of the property has been invaded, those who invade the possession of the complainant may be disposed of as "trespassers." This assumption is contrary to the basic equitable principles of the statute as stated in the case of *Sharon vs. Tucker*, supra, from which they are drawn.

For all practical purpose a proceeding "to quiet title to land" under the provisions of Section 1501, Title 16 of the District of Columbia Code against the record title holders of said land is an "equitable action of ejectment to establish the right and title of the complainant as against the world" (See *Johnson vs. Thomas*, supra); whereas, the findings of fact and conclusions of law show that appellee's claim of title is established by a decree entered only against persons who "were trespassers" upon the alleged possession of appellee.

The decree entered is of no validity against the appellants "as trespassers" upon the claim of title of appellee by adverse possession; because a District Court of the United States for the District of Columbia does not have jurisdiction of an action of trespass by "forcible entry and detainer" as the findings of fact undertake to characterize the entry of appellants upon the land in question (see Section 703 and 704, Title 11, District of Columbia Code).

Outside of the finding that appellee had occupied the land in question for a long period of time prior to the commencement of the suit under the provisions of Section 1501, Title 16 of the Code, there is nothing in the findings of fact or conclusions of law to show that appellants claimed title to the land under the record title of Chauncey I. Withrow, or that the appellants are asserting any claim to the record title of said land. When the appellants are characterized as "trespassers" by the conclusions of law, it

is the equivalent of a holding by the Court that they are not necessary or indispensable parties defendant to a suit under the provisions of Section 1501, Title 16 of the District of Columbia Code; and inasmuch as the findings of fact and conclusions of law must be understood and interpreted by the language used therein—it will be seen that the cause of action adjudged does not lift the status of the appellee above the plane of a mere licensee of the record title holder of Lot 16, Square 4045. So far as the findings of fact go, the record title of Lot 16 is vested in Chauncey I. Withrow, and inasmuch as Chauncey I. Withrow has not been made a party defendant to the equitable cause of action prosecuted by the appellee, the decree entered may not be sustained under the findings and conclusions of law.

II

The substantive provisions of Section 384, Title 28 USCA are binding upon a United States District Court for the District of Columbia in an equitable cause of action under the provisions of Section 1501, Title 16 of the District of Columbia.

The rule for the entry of a declaratory judgment by a court of equity for the District of Columbia as provided by Section 1501, Title 26 of the District of Columbia Code is drawn from the equitable principles announced in the case of *Sharon vs. Tucker*, 144 U. S. 533, and was first adopted for the District of Columbia by Section 111 of the 1901 Code of the District of Columbia (see *Harvey vs. Miller*, 24 App. D. C. 51).

This Section of the Code is one of absolute equity and has for its generating source adverse possession of land by the one invoking its provisions for a period of years

sufficient to satisfy the statute of limitation of fifteen years, and the complete absence of *actual possession* of the land in question by the record title holder when the suit is commenced (see *Sharon vs. Tucker*, supra, and *Myers vs. Mayhem*, 32 App. D. C. 205).

The record title holder of land is an indispensable party to an equitable cause of action under the provisions of Section 1501, Title 16 of the Code (see *Johnson vs. Thomas*, 23 App. D. C. 141).

The provision of the Code is that "in such an action it shall not be necessary to make any person a party defendant, except such person as may appear to have a claim of title adverse to that of the complainant," but this is as much to say that all persons who appear to have a claim of title adverse to that of the complainant must be made parties defendant. That would be the requirement of equity in any event

The appellants are shown to be the record title holders of Lot 16 in Square 4045 (App. pp. 19, 20 and 21) and they were made parties defendant to this suit because of that fact on the 13th day of February, 1941. The proof shows conclusively that appellants were the record title holders of said land before the commencement of the suit herein; and at the time the suit was commenced they were in the *actual possession* of said land claiming it as their own (App. pp. 24 and 25).

The evidence of appellee shows conclusively that before the day the suit was filed the appellant had *erected a wire fence* on the line between Lots 22 and 16 of Square 4045 (App. pp. 13, 17, 18 and 19); and this fact is also established by the evidence of appellants (App. p. 13). By erecting the wire fence between Lots 16 and 22 before the suit was commenced, the appellants took the actual possession of the whole of Lot 16.

The bill of complaint *alleges* that "*appellee* was in the

actual possession of the land at the time the bill of complaint was filed," and such allegations from the principal issue to be tried with respect to the power of a Court of Equity to enter a declaratory judgment. It was not, however, necessary that appellee be in the *actual possession* of the land at the time the suit was commenced, if prior to that time the period of his possession had been adequate to perfect title; but it is indispensable to his *equitable cause of action* for a declaratory judgment under the provisions of Section 1501, Title 16 of the Code that the title holder be *not in the actual possession*. (See *Sharon vs. Tucker*, supra, and *Myers vs. Mayhem*, supra).

The bill of complaint filed herein for a declaratory judgment of title to land by adverse possession as provided in Section 1501, Title 16 of the District of Columbia Code, prays for an adjudication of what is essentially an equitable cause of action (see *Sharon vs. Tucker*, supra). The Court was as free as in any *other suit in equity* to grant or withhold the relief prayed, upon equitable grounds; but the substantive provisions of Section 384, Title 28 USCA provide a limitation upon the exercise of equitable jurisdiction by a District Court of the United States, under the provisions of Section 1501, Title 16 of the District of Columbia Code.

The substantive provisions of Section 384, Title 28 USCA are to the effect that a District Court of the United States *shall* withhold the entry of a declaratory judgment under the provisions of Section 1501, Title 16 of the District Court of the District of Columbia in an equitable cause of action where the proof shows that the alleged adverse possession of the claimant to the land *had been invaded by the title holders* thereof before the suit was filed (see *Sharon vs. Tucker*, supra). The reason why it was the duty of the Trial Court, in the exercise of sound discretion, to withhold the relief prayed for in this suit is

that the appellee had a clear, adequate and complete remedy at law against appellants; and furthermore, by the entry of a declaratory judgment—as was done by the Court in this proceeding—a constitutional privilege of appellants, to have the facts as to their right to the *actual possession* of said land passed upon by a jury, has been denied and violated. (See *Whitehead vs. Shattuck*, 138 U. S. 146).

III

The entry of the decree of declaratory judgment herein amounts to an abuse of discretion by a Court of Equity of the United States.

At the close of the evidence of appellee, and at the close of all the evidence, the appellant moved the District Court to dismiss the bill of complaint on the grounds that the cause of action alleged therein for a declaratory judgment had not been established by the proof (App. pp. 19 and 25). Both motions were denied, but the findings of fact purported to be made show conclusively that it was an abuse of discretion for the Court to enter a declaratory judgment of title in this proceeding.

The proof shows that the appellants had entered into the actual possession of the land in question before the bill of complaint was filed, and that they are the record title holders to said land (App. pp. 13 and 20.) The findings of fact make no mention of the proof, but the findings do say that “at or about” the time the bill of complaint was filed the appellants had entered into the *actual possession* of said land “without the consent of appellee”; and have continued to hold the actual possession thereof ever since (App. pp. 11). The conclusions of law refer to appellants as “trespassers.” However, neither the findings of fact nor the conclusions of law are responsive to the equitable

cause of action alleged, and both show a clear abuse of discretion when the declaratory judgment entered is interpreted in the light of such findings of fact and conclusions of law. (See *Great Lakes Dredge & Dock Co. vs. Huffman*, decided by the Supreme Court on May 24, 1943.)

Rule 2 of the Federal Rules of Civil Procedure does not change, limit or supersede the substantive or procedural provisions of Section 1501, Title 16 of the District of Columbia Code with respect to the entry of a declaratory judgment by a District Court of the United States, and a suit under said section is a cause of action of *absolute equity*. (See *Great Lakes Dredge & Dock Company, supra*; *Johnson vs. Thomas, supra*; and *Sharon vs. Tucker, supra*).

Rule 2 of the Rules of the Federal Rules of Civil Procedure does not purport to abolish the distinction between absolute causes of action at law and in equity; and the remedies in each such cause of action remain the same as they were before the adoption of such rule (see *Bellavance vs. Plastic Craft Novelty Co.*, 30 Fed. Supp. 37; *Williams vs. Collier*, 32 Fed. Supp. 321, and *Ettelson vs. Metropolitan Life Insurance Company*, 317 U. S. —).

The appellee has the absolute right to select the cause of action he desires to prosecute, whether or not he may be able to prove the cause stated; but it amounts to an abuse of discretion when a Court of Equity of the United States subverts the substantive provisions of Section 384, Title 28, USCA by entering a declaratory judgment in an absolute equitable cause of action for extraordinary relief when the proof submitted by the appellee shows *conclusively* that he is not entitled to the extraordinary relief prayed for and that he had a clear, plain and adequate remedy at law at the time the equitable suit for a declaratory

judgment was commenced. (See *Sharon vs. Tucker*, supra, and *Whitehead vs. Shattuck*, supra).

It is conceivable that appellee has elected to prosecute an absolute cause of action in equity with the belief that a Court of Equity has the discretionary power, notwithstanding the substantive provisions of Section 384, Title 28 USCA to enter a declaratory judgment of fee simple title under the provisions of Section 1501, Title 16 of the District of Columbia Code; and upon the entry of such a judgment it may be enforced, for the purpose of *regaining possession to the land* "declared to be vested in him by adverse possession," by injunctive process. However, the appellee has no absolute right to cut the pattern of his cause of action to fit the cloth of the relief he desires; and there is no rule of procedure that will permit counsel for appellee to chart the jurisdiction of a Federal Court of Equity.

While the decree entered herein contains no specific provision for its execution by the award of an *injunctive writ* or other process—it contains a statement in its caption that it is a decree for "mandatory injunction" as well as a decree of "title by adverse possession" (App. p. 12). The appellants possessed the right as the record title holders of the land in question (it being admitted that they are the holders of the record title to the land (App. p. 8)), to defend the equitable suit of appellee for a declaratory judgment under the provisions of Section 1501, Title 16 of the District of Columbia Code; and since it is the settled rule that a Court of Equity must hear and decide an equitable cause of action under the provisions of Section 1501, Title 16, of said Code, the declaratory decree to be entered must stop short of an invasion of the Constitutional right of appellants to have the question of fact with respect to their *actual possession* of the land, as shown by the proof, passed upon by a jury. (See *Whitehead vs.*

Shattuck, supra). A judgment of dismissal of the bill of complaint, as required by the proof, would be a declaratory judgment within the meaning of Section 1501, Title 16 of the District of Columbia Code. (See *Great Lakes Dredge & Dock Company*, supra).

Section 1501, Title 16 of the District of Columbia Code, provided a new form of procedure for the adjudication of equitable rights in conformity to the principle thereof as announced in the case of *Sharon vs. Tucker*, supra. (See *Harvey vs. Miller*, supra).

The considerations which persuaded federal courts of equity not to grant extraordinary relief in equitable causes of action where the plaintiff praying for such relief has a clear, plain and adequate remedy at law, is likewise a restraint in the use of the declaratory judgment procedure as provided by Section 1501, Title 16 of the District of Columbia Code. (See *Sharon vs. Tucker*, supra, and *Whitehead vs. Shattuck*, supra).

Rule 38(b) of the Rules of Federal Civil Procedure provides that "any party may demand a trial by jury of any issue triable of right by a jury"; but an equitable cause of action prosecuted under the provisions of Section 1501, Title 16 of the District of Columbia Code for a declaratory judgment of title by adverse possession may not rightfully *present* an issue "triable of right by a jury" (see *Sharon vs. Tucker*, supra). The cause of action prosecuted by the appellee is exclusively a nonjury action; and when the actual possession of the property by appellants was established by the proof of appellee, the motion of appellants for a dismissal of the equitable cause of action should have been sustained. The trial court has attempted to by-pass the *question* of actual possession by appellants of the property and retain jurisdiction of the equitable cause of action stated in the bill of complaint, by characterizing appellants "as trespassers" (App. p. 11).

The equitable cause of action stated in the bill of complaint has been adjudged contrary to the principles of equity, and the judgment entered therein should, therefore, be reversed (see *Sharon vs. Tucker*, supra).

CONCLUSIONS

There can be no escape by appellee from the findings of fact that appellants, as the record title holders of the land in question, have the *actual possession thereof*. There can also be no escape from the evidence of appellee that the record title holders took the *actual possession* of said land before the equitable cause of action was commenced. (See App. pp. 13, 16 and 17). There was, therefore, no *proper judgment* that the District Court could enter in the cause but that of a dismissal of the bill of complaint under the motions of the appellants during the trial of the case, and at the close of all the evidence.

In failing to grant said motions of the appellants, the Court has abused its discretion by the entry of the declaratory judgment herein of fee simple title in appellee. (See *Sharon vs. Tucker*, supra, and *Whitehead vs. Shattuck*, supra). The case is ended with the entry of the declaratory judgment, in that Section 1501, Title 16 of the District of Columbia Code makes no provision for the award of process or execution to carry the judgment into effect, except the recordation of the decree in the office of the Recorder of Deeds for the District of Columbia.

So long as the application of Section 1501, Title 16 of the District of Columbia Code is confined to the type of an equitable cause of action for which it was intended under the principles of *Sharon vs. Tucker*, supra, it embraces only the familiar examples of judicial proceedings designed to quiet title to land (see *Nashville, Chattanooga & St.*

Louis Railway Co. vs. Wallace, 288 U. S. 263, 77 L. Ed. 736).

When the proof of the appellee, in an absolute equitable cause of action commenced and prosecuted under the provisions of Section 1501, Title 16 of the District of Columbia Code, shows that a mere declaration of title in him by adverse possession is not sufficient for his full enjoyment of the *possession* of said land, because of the fact the record title holder is in the *actual possession* of same at the time the suit was commenced, he must suffer the consequence of a dismissal of his bill of complaint. A federal court of equity may not do more in this case, in the exercise of sound discretion under the substantive provisions of Section 384, Title 28 USCA than dismiss the bill of complaint.

The appellee is bound by the equitable cause of action stated in his bill of complaint and he is likewise bound by the decree "for equitable relief" purported to be adjudged in the decree, which his counsel prepared and submitted to the Court for entry. The bill of complaint and decree entered show conclusively that appellee has elected to commence and prosecute an absolute nonjury cause of action in equity; whereas, the proof shows that the only cause of action possessed by the appellee, if any, was a jury cause of action at law of ejectment. The equitable decree entered may not be enforced against appellants without violating their Constitutional rights under the provisions of the Seventh Amendment to the Constitution, which rights have not been waived.

The decree entered herein must be reversed and appellee's suit directed to be dismissed.

Respectfully,

ROBERT A. LITTLETON,
Attorney for Appellants.

APPENDIX

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

No. 8537

MILTON E. GROOME ET AL.,
Appellants,

v.

GILLARD J. STEWARD,
Appellee.

**Appeal from the District Court of the United States
for the District of Columbia**

APPENDIX TO APPELLANT'S BRIEF

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS DESIGNATED BY APPELLANTS**

Filed Jan. 25, 1941

**Complaint to Establish Title by Adverse Possession
and Injunction**

1 1. The plaintiff is a citizen of the United States and a resident of the District of Columbia, and jurisdiction is based on Title 18, Section 101; Title 25, Section 1 and 2; and Title 24, Section 341 of the Code of Laws for the District of Columbia.

2 2. The defendant, Louis Pearlstein, is a citizen of the United States and a resident of the District of Columbia and is holder of record title to Lot 816 in Square 4045, and the defendants, John J. Martin, Fred S. Martin, Irving E. Martin and Russell B. Martin, t/a Martin Brothers, is a partnership doing business in the District of Columbia.

3. That by a deed dated November 1, 1920, the plaintiff purchased the following described premises:

“Lot twenty-two (22) in Grace Thompson and Teresa Thompson subdivision of lots in Block 2 Ivy City as same is recorded in Liber 34 folio 137 of the recorded subdivisions of the office of the Surveyor for the District of Columbia.”

2 known as 1907 Capitol Avenue, Northeast, from Chauncey I. Withrow; that on, to wit, November 19th, 1920, he entered into possession of the said premises and has continuously had possession of the same from that day to this; that he has also had adverse possession continuously for over twenty (20) years of a part of Lot 16, as recorded in the Surveyor's Office for the District of Columbia in Book Levy Court 2, Page 76; being part of Lot 816, per Assessor's Record of the District of Columbia. Beginning for the same in the Northeasterly line of said Lot 16, at a point which is 15.0 feet, Northwesterly from the North-

westerly line of West Virginia Avenue 88.0 feet wide, and running thence with said Northeasterly line of said Lot 16, Northwesterly 21.0 feet to the most easterly corner of Lot 22 in Square 4045, thence with the Southeasterly line of Lot 22, Southwesterly 18.0 feet, thence parallel to the northeasterly line of Lot 16, Southeasterly 21.0 feet; thence parallel to West Virginia, Northeasterly 18.0 feet to point of beginning, as appears from "Exhibit A" attached hereto and made a part hereof.

4. That by virtue of the aforesaid possession of said real estate, the title to said real estate has vested in the plaintiff by adverse possession; that your plaintiff is informed that the record title to Lot 16 is now held by the defendant, Louis Pearlstein, who has engaged the defendants, Martin Brothers, a partnership, to build an apartment house on the site now held by the plaintiff by adverse possession and that unless an injunction is issued against the defendants, irreparable damage will be done.

WHEREFORE THE PREMISES CONSIDERED, the plaintiff prays that a judgment be passed declaring and adjudging the title of the plaintiff to the real property described in the third paragraph to be good in him by adverse possession, and for an injunction, both pendente lite and permanent, to enjoin the defendants from building on the real estate described in this Complaint, and for such
 3 other and further relief as to the Court appears proper.

WINSTON C. GRIMM
 ALBERT BRICK,

Attorneys for Plaintiff,
 619 Southern Building,
 Washington, D. C.

Filed Feb. 13, 1941

Order Adding Parties Defendant

6 On motion of defendants, which is consented to by plaintiff, it is

ORDERED, that Milton E. Groome, John W. Lyles and Fred H. Ugast be and they hereby are added as parties defendant herein; and it is further

ORDERED, that said defendants have leave to file their joint and several answer to the complaint herein, which answer is tendered with the motion.

T. ALLAN GOLDSBOROUGH
United States District Judge

February 13, 1941.

Filed Feb. 13, 1941

Answer

10 Come now the defendants, Milton E. Groome, John
W. Lyles and Fred H. Ugast, by their attorneys, Ma-
son, Spalding & McAtee, and by leave of Court submit their
joint and several answer to the complaint in the above en-
titled proceeding.

1. These defendants admit that the plaintiff is the own-
er and entitled to the possession of Lot Twenty-Two (22),
Grace Thompson and Teresa Thompson Subdivision of lots
in Block 2, Ivy City, as same is recorded in Liber 34, Folio
137 of the recorded subdivisions of the office of the Survey-
or for the District of Columbia, known as 1907 Capitol Ave-
nue, N. E., and that on or about November 19, 1920,
11 the plaintiff entered into possession of said prem-
ises.

2. These defendants deny that the plaintiff has at any

time had adverse possession of Lot 16, as recorded in the Surveyor's office for the District of Columbia in Book Levy 2, Page 76, being part of Lot 816, per Assessor's Record of the District of Columbia, which is described by metes and bounds as follows:

Beginning in the Northeasterly line of said Lot 16, at a point which is 15.0 feet, Northwesterly from the Northwesterly line of West Virginia Avenue 88.0 feet wide, and running thence with said Northeasterly line of said Lot 16, Northwesterly 21.0 feet to the most Easterly corner of Lot 22 in Square 4045, thence with the Southeasterly line of Lot 22, Southwesterly 18.0 feet, thence parallel to the Northeasterly line of Lot 16, Southeasterly 21.0 feet; thence parallel to West Virginia Avenue, Northeasterly 18.0 feet to the point of beginning, as appears from Exhibit A attached to the complaint herein.

3. These defendants aver that they are the owners of, hold the title to, and that they and those under whom they claim have been in the actual possession of the property described in paragraph 2 above. That said property has at all times been assessed for taxation to these defendants, or those under whom they claim, that the taxes so assessed have been regularly paid and that they and those under whom these defendants claim have at all times exercised control and possession over said property.

4. These defendants show to the Court that the property described in paragraph 2 above is included in the description of the property to which they hold title under a deed from defendant Louis Pearlstein dated January 4, 1941, and filed for record in the office of the Recorder of Deeds for the District of Columbia and given Instrument No. 271 for identification. That the description of the land covered by said deed is as follows:

Part of Lots numbered Sixteen (16), Seventeen (17) and Eighteen (18) in Block numbered Two (2) in F. W. Jones' subdivision of part of "Youngsborough," known as "Ivy City," as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber Levy Court 2 at folio 76, described as follows: beginning at the intersection of the East line of Central Avenue and the North line of West Virginia Avenue; thence North along the East line of Central Avenue, 39.40 feet to the Southwest corner of Lot numbered Nineteen (19) of Grace Thompson and others' subdivision in said block, as per plat recorded in said Surveyor's Office in Liber 34 at folio 137; thence by and with the Southerly line of Lots numbered Nineteen (19) to Twenty-two (22) in the aforesaid subdivision. Northeasterly 104.98 feet; thence Southeasterly at right angles 36 feet to the North line of West Virginia Avenue; thence Southwesterly along said North line of said avenue, 121 feet to the beginning; said property now known for purposes of assessment and taxation as Lots numbered Eight Hundred and Seven (807), Eight Hundred and Eight (808) and Eight Hundred and Nine (809) in Square numbered Forty Hundred and Forty-five (4045).

5. These defendants show to the Court that as the owners of the property described in paragraph 4 above, they did on or about the 25th day of January, 1941 enter into a contract with defendants John J. Martin, Fred S. Martin, Irving E. Martin and Russell B. Martin, members of the partnership doing business under the firm name and style of Martin Brothers, to erect a building upon the property described in paragraph 4 above, and that said defendants are now, and have at all times rightly been in possession of said property for the erection of said building thereon.

6. These defendants deny that the plaintiff has at any time entered into the possession of a part of the property described in paragraph 4 above adversely to the owner thereof; and they deny that the plaintiff has

at any time held the continuous adverse possession of any part of said property against the true owner thereof.

7. These defendants show the Court that any entry that the plaintiff may have made upon any part of the property described in paragraph 4 above he did so with the consent and approval of the true owner of said land and with the agreement and understanding that he would vacate such possession at any time the true owner of said land may desire to improve the property by the erection of a building or buildings thereon; and that inasmuch as these defendants are now, by proper deed of conveyance, the true and lawful owners of said property, the plaintiff has no right or claim to deny to them the full possession thereof or to interfere in any manner with the free occupancy of said property by agents or tenants of these defendants.

WHEREFORE these defendants demand that the plaintiff's complaint be dismissed and that they be awarded their reasonable cost against the plaintiff.

ROBERT A. LITTLETON,
GUY MASON,
MASON, SPAULDING &
McATEE,

Attorneys for Defendants,
1021 Tower Building,
Washington, D. C.

Filed Oct. 30, 1942

Pretrial Proceedings

14 STATEMENT OF NATURE OF CASE:

This is an action to establish title by adverse possession and for a mandatory injunction to restrain the defendants' possession of the property in question.

Part of Lots numbered Sixteen (16), Seventeen (17) and Eighteen (18) in Block numbered Two (2) in F. W. Jones' subdivision of part of "Youngsborough," known as "Ivy City," as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber Levy Court 2 at folio 76, described as follows: beginning at the intersection of the East line of Central Avenue and the North line of West Virginia Avenue; thence North along the East line of Central Avenue, 39.40 feet to the Southwest corner of Lot numbered Nineteen (19) of Grace Thompson and others' subdivision in said block, as per plat recorded in said Surveyor's Office in Liber 34 at folio 137; thence by and with the Southerly line of Lots numbered Nineteen (19) to Twenty-two (22) in the aforesaid subdivision. Northeasterly 104.98 feet; thence Southeasterly at right angles 36 feet to the North line of West Virginia Avenue; thence Southwesterly along said North line of said avenue, 121 feet to the beginning; said property now known for purposes of assessment and taxation as Lots numbered Eight Hundred and Seven (807), Eight Hundred and Eight (808) and Eight Hundred and Nine (809) in Square numbered Forty Hundred and Forty-five (4045).

5. These defendants show to the Court that as the owners of the property described in paragraph 4 above, they did on or about the 25th day of January, 1941 enter into a contract with defendants John J. Martin, Fred S. Martin, Irving E. Martin and Russell B. Martin, members of the partnership doing business under the firm name and style of Martin Brothers, to erect a building upon the property described in paragraph 4 above, and that said defendants are now, and have at all times rightly been in possession of said property for the erection of said building thereon.

6. These defendants deny that the plaintiff has at any time entered into the possession of a part of the property described in paragraph 4 above adversely to the owner thereof; and they deny that the plaintiff has

at any time held the continuous adverse possession of any part of said property against the true owner thereof.

7. These defendants show the Court that any entry that the plaintiff may have made upon any part of the property described in paragraph 4 above he did so with the consent and approval of the true owner of said land and with the agreement and understanding that he would vacate such possession at any time the true owner of said land may desire to improve the property by the erection of a building or buildings thereon; and that inasmuch as these defendants are now, by proper deed of conveyance, the true and lawful owners of said property, the plaintiff has no right or claim to deny to them the full possession thereof or to interfere in any manner with the free occupancy of said property by agents or tenants of these defendants.

WHEREFORE these defendants demand that the plaintiff's complaint be dismissed and that they be awarded their reasonable cost against the plaintiff.

ROBERT A. LITTLETON,
GUY MASON,
MASON, SPAULDING &
McATEE,

Attorneys for Defendants,
1021 Tower Building,
Washington, D. C.

Filed Oct. 30, 1942

Pretrial Proceedings

14 STATEMENT OF NATURE OF CASE:

This is an action to establish title by adverse possession and for a mandatory injunction to restrain the defendants' possession of the property in question.

Defendant Pearlstein has been dismissed from the cause. The defendants named Martin are claimed to be the agents of the remaining defendants, and this fact is admitted. The remaining defendants are the record owners and this fact is admitted.

The sole issue is whether or not the plaintiff has established adverse possession of the property in question for the requisite number of years.

Defendants deny that the plaintiff has had open, notorious, adverse, continuous and exclusive possession of the property in question for the requisite period of years.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

Deeds initialed by the Pre-Trial Judge may be received in evidence without formal proof; also abstract of title and certificate of tax payments may be received in evidence without formal proof, as evidence of the facts therein stated. Surveyor's Plat initialed by the Pre-Trial Judge may be received in evidence without formal proof. Deed conveying Lot 22 to plaintiff dated Nov. 1, 1920 may be received in evidence without formal proof. This is not initialed by the Pre-Trial Judge as plaintiff's counsel did not have it in his possession at this Pre-Trial hearing. The property at issue is that shown on Surveyor's plat, initialed by the Pre-Trial Judge and circled in RED, as described in the Bill of Complaint and lies immediately to the rear of Lot 22 and being a part of Lot 16.

October 30, 1942

ALBERT BRICK,

Plaintiff,

ROBERT A. LITTLETON,

Defendants.

BOLITHA A. LAWS,

Pre-Trial Justice.

65

Docket Entries

Date	Proceedings	* * *	Deposits Fees Total
1943			
Jan. 27—	Judgment-Pltf is granted title by adverse possession and the described land is deeded in fee simple by adverse possession to the pltf. (n 3) Letts J		
Feb. 5—	Motion for New Trial and or Vacate Judgment. P and A	filed	
Mar. 15—	Supplemental points in support of motion by deft	filed	
Mar. 23—	In opposition to (1) Motion to vacate (2) mo for judgment (3) mo for new trial; P & A		
April 13—	Order overruled (1) motion to vacate (2) mo for judgment (3) mo for new trial (n) Letts J		
April 17—	Notice of Appeal—Copy mailed Brick—Deposit by Littleton		5 — 5 — 5

* * *

51

Findings of Fact

1. That by a deed dated November 1, 1920, the plaintiff purchased from Chauncey I. Withrow, the premises known as 1907 Capitol Avenue, Northeast, in the District of Columbia, and described as follows:

Lot Twenty-two (22) in Grace Thompson and Teresa Thompson subdivision of lots in Block 2 Ivy City as same is recorded in liber 34 folio 137 of the record-

ed subdivision of the Office of the Surveyor for the District of Columbia.

2. That the plaintiff had no title search or survey made of the aforementioned premises prior to the time of or after the purchase of the premises; that at the time the seller, Chauncey I. Withrow, showed the property to the plaintiff, he pointed out and told the plaintiff that the premises included the rear portion which then had a fence around it and also a large shed; that the plaintiff understood and believed that at the time he purchased said premises as aforesaid, that it included the portion enclosed by a fence and shed as is set forth in plaintiff's exhibit 2, which is attached hereto and made a part hereof; that the plaintiff occupied as his own and used the same as his own on or before November 1, 1920, all of that land enclosed within the aforementioned fence and shed comprising all of lot 22 in square 4045 and a part of lot OF-16 of square 4045, as per the plat attached hereto and among the
52 land records of the District of Columbia and which part of Lot OF-16, Square 4045 is described more particularly as follows:

Part of Lot 16, as recorded in the Surveyor's Office for the District of Columbia in Book Levy Court 2, page 76; being part of Lot 816 as per the Assessor's Record of the District of Columbia, Beginning for the same in the Northeasterly line of said Lot 16 at a point which is 15.0 feet, Northwesterly from the Northwesterly line of West Virginia Avenue 88.0 feet wide, and running thence with said Northeasterly line of Lot 16, Northwesterly 21.0 feet to the most Easterly corner of Lot 22 in Square 4045 thence with the Southeasterly line of Lot 22, Southwesterly 18.0 feet thence parallel to the Northeasterly line of Lot 16, Southeasterly 21.4 feet, thence parallel to West Virginia Avenue, Northeasterly 18.0 feet to point of beginning.

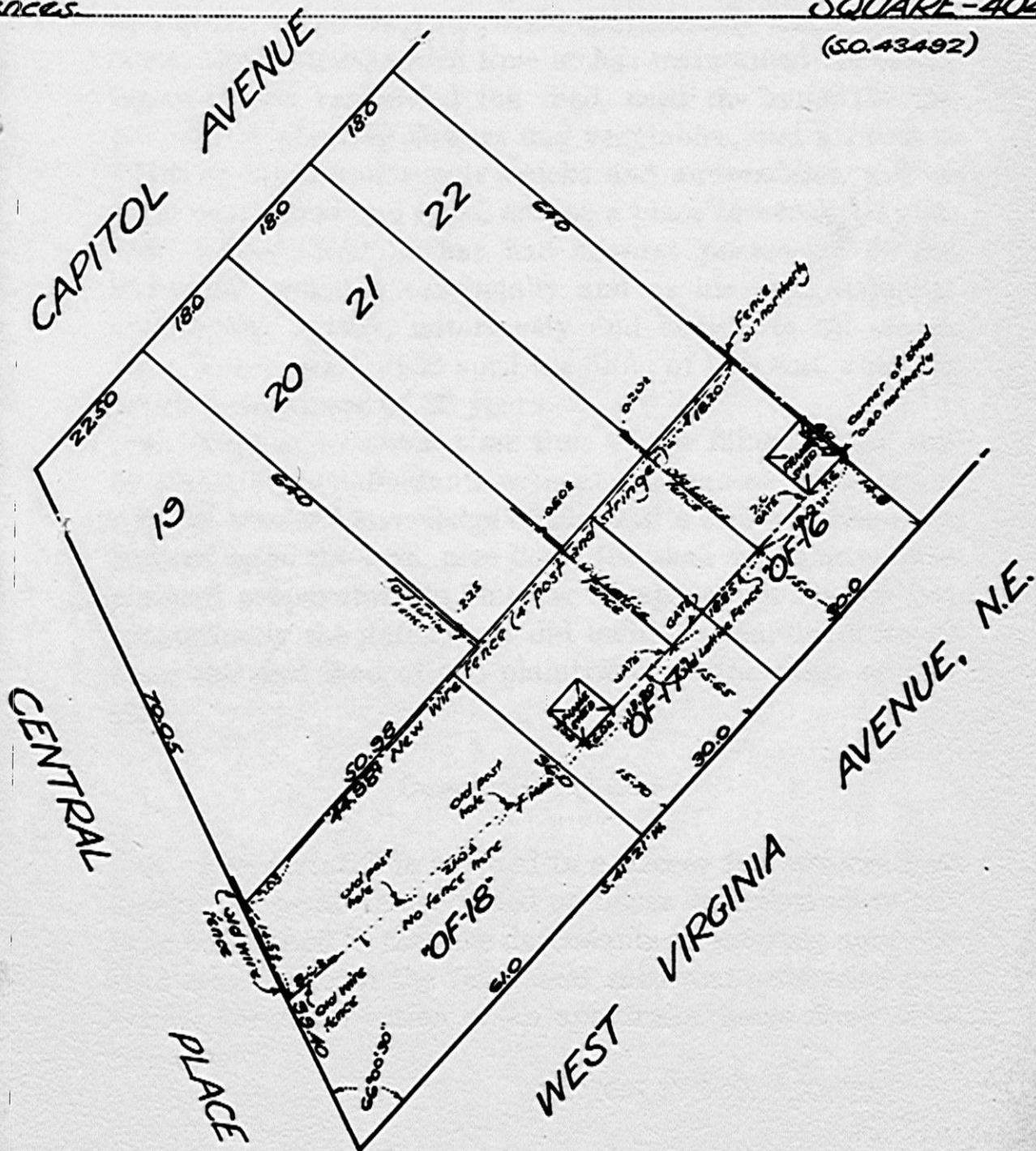
Surveyor's Office
DISTRICT OF COLUMBIA

Washington, January 25th, 1941

Plat of Survey of lots "OF-16" to "OF-18" to locate fences and evidence of old fences.

SQUARE-4045

(SO. 43492)



—Scale: 1-inch = 20 feet—

HEREBY CERTIFY, That the foregoing plat is correct in accordance with Law and Record. Actual survey made this 23rd day of January, 1941, for Albert Brick

By C. H. M... Assistant Engineer.

F. F. M... Surveyor, District of Columbia.

NOTE.—Record figures shown in black, but do not necessarily agree with actual measurement.

DISTRICT OF COLUMBIA
SOUTHWEST QUARTER



Scale 1 inch = 20 feet

NOTE:—The following is a list of the names of the persons who have been granted rights of way for the purpose of crossing the land shown on this map. The names are given in the order in which they were granted, and the date of each grant is given in parentheses.

1. *John A. Smith* (1880)

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100. *John A. Smith* (1880)

3. That the plaintiff has had adverse possession of that portion of the premises extending on a part of lot OF-16 in square 4045 as above described and which was enclosed by the fence and shed aforesaid continuously since November 1, 1920, during which time he has maintained the fence, repaired and remodeled the shed, used the same for the purpose of planting flowers and vegetables, and a place in which to store and repair trucks and automobiles, and to store coal, wood and tools, and as a place in which his children played; that he has had adverse possession of the aforesaid premises continually and as his own, actually, exclusively, openly, notoriously and hostile to all others from November 1, 1920 until the filing of this suit, a period which is in excess of 20 years.

4. That at or about *time* time of the filing of this suit by plaintiff the defendants without the consent of the plaintiff and with full knowledge of plaintiff's claims to the land, entered upon the land, tore down the shed and fence of the plaintiff preparatory to building an apartment house; that subsequently the defendants did build an apartment house upon the said land of the plaintiff after the filing of this suit.

Conclusion of Law

5. The plaintiff is entitled to a decree for adverse possession of the aforementioned premises described more fully in paragraph 2; that the defendants in entering upon the land tearing down the fence and shed and otherwise preparing for the erection of an apartment house were trespassers.

F. DICKINSON LETTS,
Justice.

Filed Jan. 27, 1943

**Decree for Title to Land by Adverse Possession and
Mandatory Injunction**

55

Upon consideration of the evidence adduced in open Court by plaintiff and defendant in the above cause and it appearing to the satisfaction of the Court that the plaintiff is entitled to the title to the hereinafter described land by adverse possession, it is by the Court this 27 day of January, 1943:

ADJUDGED, ORDERED AND DECREED:

1. That the plaintiff be, and he is hereby, granted title by adverse possession to the following described land, to wit,

Part of Lot 16, as recorded in the Surveyor's Office for the District of Columbia in Book Levy Court 2, page 76; being part of Lot 816 as per the Assessor's Record of the District of Columbia, Beginning for the same in the Northeasterly line of said Lot 16 at a point which is 15.0 feet, Northwesterly from the Northwesterly line of West Virginia Avenue 88.0 feet wide, and running thence with said Northeasterly line of Lot 16, Northwesterly 21.0 feet to the most Easterly corner of Lot 22, in Square 4045 thence with the Southeasterly line of lot 22, Southwesterly 18.0 feet thence parallel to the Northeasterly line of Lot 16, Southeasterly 21.4 feet, thence parallel to West Virginia Avenue, North-easterly 18.0 feet to point of beginning.

2. That the above described land be, and it is hereby, deeded in fee simple by adverse possession to the
56 plaintiff.

F. DICKINSON LETTS,

Justice.

Statement of Evidence

* * *

15 GILLARD J. STEWARD, being called as a witness in his own behalf testified as follows:

16 * * *

I have lived there constantly since I went there. I live there now. I have lived there since 1920 down to the present time. I always kept my fence up and where it looked like it would get weak—always kept that fence repaired the same as new. The fence has been there during all the years I have occupied the place. There is another portion they put a line through; but my fence was there until they tore it down. This company that done the building there tore my fence down. I don't know who they were; but the company that done the building was the one that tore it down. They took the shed and moved that away. I was away from home when they moved the shed away. They moved the fence and damaged the shed and taken it away while I was up there on Georgia Avenue at work; and my son calls me up and asks me did I know they had cut up your yard in two, in the back, and they had cut it in two, and was taking it away. So, when I had a chance I slipped back there and they had moved the shed away. When I work sometimes I would be away a week, three or four days. I believe the property was mine. I bought it for mine and I know it is mine. I learned about the fence being torn down through my son calling me up. That
17 was shortly before this suit was filed. I learned they come in there and cut my fence down and put these buildings there, and so when I saw what they done I went to see the lawyer, and I told him and asked him if they

could take any steps for to stop him. After they cut my fence down, after I learned that, I went to the lawyer.

I have never admitted any other claims against it. I know it was mine.

(At this place the witness was shown a Plat of Square 4045 of Lots 16, 17, 18, 19, 20, 21 and 22 on which he indicated that part of Lot 16 on which he had maintained a fence and a shed.)

I claim as mine all of the property which is represented by Lot 22, and that portion of Lot 16 which is included within the red line on the Plat, which is Plaintiff's Exhibit No. 2.

Cross-Examination

* * *

18 I paid \$1100 for that lot. It had a house on it. The fence which began at my shed runs all the way across to Central Avenue. The fence there now runs between my lot and Lot 16. That is, between my lot and the shed. The fence they have got there now is not where it used to be. The other fence came all the way across. This new fence goes all the way across too. It was built when they put in the new building. About two years ago or something like that, as near as I can guess it, when they put that building there. Before then here was the fence (indicating on the Plat). The fence lines went on across to Central Avenue then. These other lots (indicating Lots 19, 20 and 21 on the Plat) had sheds all along there, on up to the corner. All four houses there (indicating the houses on Lots 19, 20, 21 and 22) when I bought this house (indicating Lot 22 on the Plat) all had sheds across there. Chauncey I. Withrow owned all that prop-

erty before I bought. I considered I was buying from Capitol Avenue to West Virginia Avenue. I did not read my deed. I did not look at a Plat. He gave me a deed. I don't know anything about how much the deed had on it but I understood plainly that I was buying from West Virginia Avenue to Capitol Avenue. That was my understanding. I wanted it for chickens, for anything, for the children, anything. I wanted to have a place, a back place, for them to play in there; and also to park cars like I had them in there.

I don't know Louis Pearlstein. I don't know anything about him. I don't know how my property is assessed. I pay somewhere around in the neighborhood of \$14 taxes. I don't know who occupied Lot 21 when I moved on Lot 22. I am pretty well acquainted in the neighborhood, but I would not know who lived on Lot 21 at the time I bought. The person who owns Lot 21 has been there about six or seven years. I don't know who occupied it before her. Lot 20 is occupied by the Harrisons. I don't know how long they have lived there. He has been there three to six years. I don't know who lived on Lot 16. I don't know anything about Lot 16. I could give you an idea of 1907 on back to 1901; but that is from Capitol Avenue. Both these lots in there back, I don't know anything about them, how they run.

I never did have a talk with Fred Ugast about the shed on Lot 16. I don't know anything about him. The shed was wood—boards. I don't know how tall it was, I never measured it. I built the one I built. The one that was there was built before. I didn't measure either one of them. I built one because that one rotted down and I repaired it. The Inspector gave me permission to build there, but I didn't get a permit. He gave me permission during the same present time they put the test station across West Virginia Avenue. The Inspector came there

and gave me permission to put my shed there, tear the old one down and build the new one. The test station was built a few years ago. I have no record of it. I don't remember measuring my lot with anyone in the last ten or fifteen years. I never did talk with anyone about having that shed. The fence there now runs all the way across to Central Avenue and is about sixty-four feet from Capitol Avenue in the rear of my house. I don't know how far the fence is from my house and I don't know how far the front of my house is from Capitol Avenue. I never measured it. My house is two stories and its width is supposed to be eighteen feet. It is as wide as my lot.

* * *

33 ANNIE JANE STEWARD, called as a witness on behalf of plaintiff, testified as follows:

* * *

34 Q. What has happened in recent times with respect to that ground back there A. Well, in 1941 I was called off my job that I was working on and told that my back yard had been cut off and a fence put back there; and I went out to see; and it was cut off and this fence was back there. My back yard had been cut in half, I should think.

Q. And they had put up a fence? A. They had put up a fence back there.

Q. You mean they had put up a fence at the point where it was cut off? A. Yes, where it was cut.

Q. And after that was done what did you find out? A. Well, I engaged a lawyer to look after it, to see what it was done for. I had never found out.

Q. Had any buildings been started at that time? A. Well, they hadn't started to build at that time.

Q. They had been started? A. No. They hadn't started anything and they had just put this fence up; and I had a little wood house out there in the yard; and they left that over there.

35 There is not much room behind the house now. I never talked with the man when we bought the place back in 1920. I was present when they looked over the place. Mr. Withrow was the gentleman that we bought this place from. He taken us out to the shed and pointed it out. He just told me all that was in the yard and shed. And it was enclosed with a fence and he told us the property line was the fence and we have always understood that we owned that property that was enclosed by a fence and we have never taken any other position about it.

Q. Have you ever been asked until here in the last year, or whatever time it was that these gentlemen changed your fence, have you ever been asked by them, or anyone, where your lines were? A. No; I haven't, no more than my husband I talked it over.

Q. Has anyone ever discussed it with you in a way that would give rise to any idea that you did not own all that was enclosed by the fence? A. No, sir; I never have.

Q. Did any of these gentlemen, or any of their representatives ever call on you and discuss the matter with you before they started that operation? A. No, sir; they never have.

Q. Your fence was standing there all these years, was it? A. All these years that I was there the fence was there.

36 Q. Your use has been continuous all these years? A. Yes, sir.

Q. It was standing there at the time they started their

operation by coming in and tearing it down? A. That is right.

Q. Did they ask your permission to tear it down or say anything to you? A. Never asked me anything.

Q. Do you know of their having asked anyone else? A. I never heard of it.

When we went there the wood shed was used as a fence back there. Just on the line. The other homes had wood sheds all the way down, but I never noticed whether the fence extended all the way down. I know the one next door did. I didn't notice the others, farther down; but the yard right next door to me had a wood shed all the way across. I used to go there and visit those people. There wasn't any street back of our place when we went there. It looked like there might have been an old road; but it was just enough. There wasn't any curb back there. I just thought it was vacant land back there.

• • •

37 WINSTON LEWIS STEWARD, called as a witness on behalf of plaintiff, testified as follows:

• • •

38 Q. Do you remember when this fence and shed were moved, here some year or so back? A. Yes, sir.

Q. What do you know about that? A. When the fence and shed was—when they was—when they first cut through our yard and put this other fence through there, I went out there, one day in January; and I usually pulled my cab up in the back yard there; and so I started in the back yard; and there was this fence coming through on there; and I was surprised. I didn't know what to do. I started to run—you know, it was a big surprise. I pulled it up

into the yard, part of the way. And when I did get out I went back to notify my mother that somebody was cutting into our back yard. I don't know whether it was the next day, but right away we went back out, to try to find out what was going on. And we didn't know ourselves even who was putting up that fence I saw there through the back. I was living up town at that time; it was
39 hard for me to stay with my mother.

Q. Had anything been started at the time your mother went to see the attorney, if you know? A. I beg pardon?

Q. Had the buildings been started at that time? A. No, sir.

Q. Had anything been started over there? A. No more than just the fence put through.

Q. Do you know anything about when those buildings were started? A. I think those buildings were started, as close as I get to it, I believe, some time about a month or two later.

Q. A month or two later? A. Yes.

The foregoing is all of the direct evidence on behalf of the plaintiff introduced at the hearing of this case.

Whereupon counsel for defendants moved the Court to dismiss the bill of complaint on the ground that the evidence does not prove the case which the plaintiff alleges in his bill of complaint. The motion was overruled and exception allowed by the Court.

At this point attorney for defendants offered, and there was received in evidence, deed of conveyance from William H. Manogue to Chauncey I. Withrow dated August 3, 1920 conveying Lots 16, 17, 18, 19, 20, 21 and 22 as shown on the Plat Exhibit A to the bill of complaint; together with the deeds of conveyance from Chauncey I. Withrow and successive record owners of Lots 16, 17 and 18

40 on said Plat down to the deed of conveyance dated January 3, 1941 from Louis Pearlstein to the defendants John W. Lyles, Milton E. Groome and Fred H. Ugast. Said deeds of conveyance for Lots 16, 17 and 18 showing the record title thereto from Chauncey I. Withrow down to the aforesaid defendants herein were received in evidence as defendants Exhibits 1 to 6 inclusive.

The attorney for the defendants also offered and there was received in evidence on behalf of the defendants an abstract statement of the defendants' title to Lots 16, 17 and 18 from Chauncey I. Withrow which shows that the taxes assessed against said Lots 16, 17 and 18 identified on the Plat Exhibit A to the bill of complaint have been paid by the record title owners thereof from the year 1927 down to the present date. Said abstract statement of title and certificate of tax payments were received in evidence as defendants' Exhibit 7.

It is stipulated and agreed between the parties as a part of this statement of evidence that inasmuch as the title papers of plaintiff herein referred to as plaintiff's Exhibits 3 and 4 describe only Lot 22 as shown on the Plat, and the title papers introduced on behalf of defendants Fred H. Ugast, John W. Lyles and Milton E. Groome, as the record title holders of Lot OF-16, being Exhibits 1 to 6 inclusive, describe only Lots 16, 17 and 18 as shown on said Plat, Exhibit A to the bill of complaint, it will not be necessary to incorporate said deeds or title papers as a part of this statement of evidence.

It is also stipulated that inasmuch as the abstract title and certificates of tax payments offered in evidence
41 show only that the record title holders of Lots 16, 17 and 18 have paid the taxes assessed against said property by the District of Columbia back to the year 1927, it will not be necessary to incorporate said certificate in this statement of evidence.

The following evidence was offered on behalf of the defendants:

LOUIS PEARLSTEIN, being called as a witness on behalf of defendants, testified as follows:

My name is Louis Pearlstein. I am an attorney-at-law and engaged in the practice of law here in the City of Washington. I am familiar with the property bordered by Capitol Avenue, Central Avenue and West Virginia Avenue in what is known as Ivy City in the District of Columbia. Exhibit No. 1 to the bill of complaint is a correct Plat of that property. At one time I was the record title owner of Lots OF-16, OF-17 and OF-18 facing West Virginia Avenue. Those lots are identified on the records of the Assessor's Office for the District of Columbia as Lots 807, 808 and 809 in Square 4045. I know that from my records while I owned the property. Before I became the title owner of Lots 16, 17 and 18 on this Plat I represented Wilson Thomas who owned that property. I think his full name is Wilson M. Thomas. Mr. Thomas acquired the property in 1921 and I became his attorney about 1926 or 1927. I negotiated a loan on the property for him through the Penn Improvement Company, whom I represented. It became the Finance Company of America after they bought out the Penn Improvement Company. Mr. Thomas lived in the District of Columbia. In connection

42 with my action as agent for Mr. Thomas for the property, Lots 16, 17 and 18, I had occasion to go out and visit the property. To go on the property. I was out there after the time Steward was living on Lot 22. I had a conversation with Steward about Lot 16 and the back part of his property. At the time I was there and had a conversation with Mr. Steward about the property, it was sometime in the year 1934 as nearly as I can remember, I noticed something was being put on there that

was not on when I first came there in 1927. When I first knew the property identified as lot 16 there was nothing on it except debris. There was a little shed there. My impression was that it was a dog house. I passed through there in 1934 on my way from my home and I noticed something there that was not there before that. I distinctly remember it was on a Saturday afternoon. I stopped at Steward's place and he was working on this shed. I said "it looks to me as if you are beyond your building line." He says "I don't know where my building line is." I says "you have a deed?" He says "yes." I said "doesn't your deed call for a certain number of feet?" He says "I don't remember." I asked him to go in the house and get the deed. He said he don't know where it is. And then I went back to the car and measured from the front of his house, sixty-four feet, and showed him where his line was. I had a Plat and I had ordered the Plat just prior to that. The Plat I have in my hand shows Lot 22. It runs back from Capitol Avenue sixty-four feet. I, at that time, measured off Lot 22 for him. He did not assist me, he was just standing there and I marked it at that time. I used a steel tape. He was on Lot 16 at the time I met him there. After I explained to him that he was putting his shed beyond the line he said he did not know where his line was. I told him that I contemplated building
 43 there very shortly and if I did he would have to move his shed; and I suggested to him not to make any substantial improvements. He said "its OK. Get the line and we won't have any trouble about it." He did not make any claim to ownership of the land where that shed was. He said he did not know where his line was. He was very friendly. After some conversation I remember saying something to him to the effect that I had no objection to his leaving it there until I got ready. At that time Lot 16 was owned by Wilson M. Thomas. I was acting in a

sort of dual capacity. At that time I was the owner of a deed of trust note which Thomas had defaulted on and foreclosure was threatened and I bought the note from the Finance Company. I marked the terminous of the sixty-four foot line from Capitol Avenue with a crayon on the fence. You might call it a fence, he had some boards there at the time. Steward's wife was not present at the time of the conversation. I passed the place two or three times a week. I lived out in that direction. Sometimes I would turn in at West Virginia Avenue and go through West Virginia Avenue and K Street to my office. Mr. Thomas also owned Lots 17 and 18. Lots 16, 17 and 18 were unimproved and were vacant ground.

* * *

46 FRED H. UGAST, one of the defendants, testified as follows:

My full name is Fred H. Ugast and I am one of the defendants in this law suit. I am one of the parties named in the deed from Pearlstein. That deed covers Lots 16, 17 and 18 in Square 4045, known for taxation purposes as Lots 807, 808 and 809 in the same square. The property is located at West Virginia and Central Avenue, N. E. I have been on the property. The first time I was ever on the property was in December, 1940. We had contemplated buying the property and I was looking at it. We were looking at all the frontage on West Virginia Avenue up to Central Avenue. I saw a shed in back of Lot 22 at the time. There were sheds on the backs of all the lots, most of them smaller than the one back of Lot 22. The shed back of Lot 22 was the largest one. There were fences on the Lots which consisted of tree limbs stuck into the ground with boards laid up against the limbs. Most of them not even fastened. I did not see the plaintiff Steward

at the time I was on Lot 16 in December, 1940. I subsequently went there with Major Milton E. Groome, my partner; and I was looking over the property; and we had a steel tape with us and we had plans drawn to erect flats on the property; and we had Martin Brothers to give us the points of the lot, as to what we had bought; and we measured from those points that Martin Brothers
47 had given us, and determined where our building would come and how much back yard we would have left. At that time I saw Steward and had a conversation with him. We were measuring off the lot, just where our building would come to. Steward came out in the back yard; and I addressed my remarks to him and I said "Mr. Steward, your shed is over on our property that we have purchased. We are going to build on this property immediately and we want you to move your shed." And he said "I will move it. When you are ready for it, I will move it." There were sheds back of each house. After we left there, we ordered Martin Brothers to have a survey made of the property, which was done promptly, and we ordered them to erect a fence as soon as that survey had been completed; and the next thing we heard from Martin Brothers was that suit had been filed against them for erecting a fence across the back of our lot. Martin Brothers are the contractors who erected the building on this property for us. George T. Santmyers drew the plans for the building. We obtained a permit from the Building Inspector of the District of Columbia. The office of the surveyor for the District of Columbia made the survey for the fence. They made the survey from their own actual records in the office of the Surveyor of the District of Columbia. They made an actual field survey. We requested them to make the survey and we paid for it.

Cross-Examination

I didn't talk to Steward in December. It was about the middle of January when I talked with him. January, 1941. I would say that about the middle of January, 1941, I talked with Steward. We had not actually commenced building at the time this suit was filed. Steward was alone when

I talked with him. He came out of the house and
48 I asked him if he owned that house that he came out of and he said yes. I didn't know it was Steward. He said he owned that house. I knew that the property was assessed to Steward, and when he came out of the house I asked him if he was the owner of that house and he said he was. I found a shed across part of our property and the remainder of the enclosure was tree limbs stuck in the ground with boards laid up against them. That would be a fence. It went back as far as the shed.

* * *

49 The foregoing is all the evidence introduced at the trial of this case.

Whereupon counsel for defendants renewed the motion for judgment in favor of the defendants on all the evidence. Whereupon the Court announced its decision as follows:

The Court (Mr. Justice Letts): You have mentioned the testimony of Mr. Pearlstein and I listened to that carefully; and, while it is in dispute as to what occurred or whether anything occurred, because Steward has denied it, nevertheless, it seems to me that, accepting as true all that Mr. Pearlstein has said, that is perfectly consistent with the plaintiff's claim of title by possession, because, if the conversation occurred which Mr. Pearlstein stated, it made no effect, it had no effect upon Steward at all, and

he went right ahead occupying the premises and using them as he had before, which would indicate even more strongly his intention to claim that title even after he had the notice which Mr. Pearlstein says he gave.

But that is just one element of the case. I have listened to all the evidence; and I think the plaintiff has made out his case.

Counsel for the plaintiff will prepare findings of fact and a suitable form of judgment and present them to
50 Mr. Littleton and then let me have them.

BRIEF OF APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8537

MILTON E. GROOME, *et al.*, *Appellants*

VS.

GILLARD J. STEWARD, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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TOWER BUILDING

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8537

MILTON E. GROOME, et al., Appellants

vs.

GILLARD J. STEWARD, Appellee

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

Statement of Case.

The findings of fact definitely established that the plaintiff by actual user had adverse possession of the part of Lot 16 in question from November 1, 1920 until the time that suit was brought against the defendants who claimed to be owners by virtue of their record title. The fact that the conclusions of law refers to the defendants as trespassers is immaterial and of no moment.

Rules Involved.

Rules 38 b, d, and 39 b of the Federal Rules of Civil Procedure provide:

“Rule 38. Jury Trial of Right.

(b.) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving

upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(d.) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d.) constitutes a waiver by him of trial by jury. * * *

Rule 39. Trial by Jury or by the Court.

(b.) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the Court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the Court in its discretion upon motion may order a trial by a jury of any or all issues."

Statement of Points.

1. The action was properly brought under Section 1501 of Title 16, of the District of Columbia Code as the answer of the appellants shows.

2. The appellants have not been denied any rights by this action for if they perceived that they were entitled to a jury trial they could have demanded a jury trial under the Federal Rules of Civil Procedure, and not having done so waived their rights to a jury trial.

Summary of Argument.

1. The facts and evidence in this case indisputably demonstrate that the appellee was entitled to title by adverse possession of the land in question prior to the filing of this suit.

2. The appellants were not entitled to a jury trial, but if it is conceded that they were, appellants have waived

their rights to a jury trial by failure to demand the same and are now estopped.

Argument.

I

The evidence disclosed that when the appellee purchased the premises located on Lot 20, the then owner, Withrow, indicated that the property included the fence and shed on Lot 16, and that the appellee since November 1, 1920, exercised dominion of that part of Lot 16 which he in reality thought and believed was his own. It is well established that adverse possession can be founded on an honest mistake as well as on a deliberate tort. *Johnson vs. Thomas*, 23 App. D. C. 141.

Furthermore, title by adverse possession is not lost even if the land is subsequently abandoned. *Myers vs. Mayhew*, 32 App. D. C. 205.

Under our statute dealing with adverse possession it is not necessary that a party be in actual possession of land when an action for adverse possession is brought for it is conceded that once title by adverse possession ripens one can stand on it as fully as if he held the undisputed title of record. See *Faulks vs. Schrider*, 72 App. D. C. 308.

Also there was no proof of a disclaimer by the appellee. See *Howison vs. Masson*, 29 App. D. C. 338.

II.

All the cases that the appellants cites with reference to the Federal Rules of Civil Procedure are cases where the

parties in question demanded jury trials, but here we have a case where the appellant nowhere demanded a jury trial. The lower Court Justice sat as a Judge and jury and the purpose of the Federal Rules of Civil Procedure was to prevent questions, such as are raised here, from further discussion once the cause is tried and a decree entered.

The appellants had ample opportunity to avail themselves of their "constitutional rights" but failed to do so and now when they are defeated they attempt to insist on their "constitutional right" to a jury trial. Sections 38 b and d, and 39 (b) of the Federal Rules of Civil Procedure give the appellants a right to demand a jury trial and having failed to do so are held to have waived their "constitutional rights" to a jury trial, and are now estopped to claim that they were entitled to a jury trial of the issues in this case.

Conclusion.

It is respectfully submitted that the Decree entered by the lower Court was founded upon ample evidence of title by adverse possession and that the appellants waived any or all rights that they had to a trial by jury even if it be conceded that they were entitled as of right to a trial by jury.

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UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

—
No. 8537

—
MILTON E. GROOME, ET AL.,
Appellants,

vs.

GILLARD J. STEWARD,
Appellee.

—
Appeal from the District Court of the United States
for the District of Columbia

—
REPLY BRIEF FOR APPELLANTS

—
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UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

No. 8537

MILTON E. GROOME, ET AL.,
Appellants,

vs.

GILLARD J. STEWARD,
Appellee.

**Appeal from the United States District Court for the
District of Columbia**

REPLY BRIEF FOR APPELLANTS

SUMMARY OF REPLY

1. The appellee advances the novel propositions (1) that the conclusions of law, which render the equitable decree entered invalid, may be disregarded as "immaterial and of no moment"; (2) that notwithstanding the failure

of appellee's proof to support the equitable cause of action alleged and prosecuted, the equitable decree entered under the provisions of Section 1501, Title 16 of the District of Columbia Code should be sustained; and (3) that the Federal Rules of Civil Procedure in some *undisclosed* manner abolish the remedial distinction between essential causes of action in equity and at law so that an essential equitable cause of action, as provided by Section 1501, Title 16 of the District of Columbia Code, *may be tried by a jury*.

2. The statements in brief of appellee are clear admissions that the equitable decree entered amounts to an abuse of discretion as the adjudication of the equitable cause of action alleged in the bill of complaint.

3. The appellants had no alternative than to defend the equitable cause of action alleged by appellee in his bill of complaint; and they being in the actual possession of the land at the time the equitable suit was commenced, as the record title holders thereto, are secure in such possession until evicted as the law requires.

4. The appellee having failed completely to establish his alleged rights to the extraordinary relief as prayed in his equitable bill of complaint, may not claim any benefits under the so-called equitable decree entered.

5. The equitable decree entered infringes the constitutional rights of appellants as the occupants of the land; and such infringement is inherent in the decree as an abuse of discretion, in the light of the findings of fact and conclusions of law upon which it purports to be based.

I.

The findings of fact make a survey of Square 4045

(which plaintiff offered in evidence as Exhibit No. 2, R. pp. 10, 11-A and 12), a part thereof; and that survey shows conclusively that prior to *its date of "January 23, 1941"* the appellants had *invaded* the appellee's alleged possession of the disputed part of Lot OF-16 in Square 4045 by erecting a wire fence enclosing the same before the equitable bill of complaint, under the provisions of Section 1501, Title 16 of the District of Columbia Code, was filed on January 25, 1941 (see R. pp. 2, 10, 11 and 14).

II

The motions of appellants for a dismissal of the equitable suit of appellee at the close of appellee's evidence, and at the close of all the evidence (R. pp. 19, 25), should have been sustained by the trial Justice, and at that stage of the proceedings counsel for appellee should have realized that the proof failed to show that appellee possessed a right of an *extraordinary character* which entitled him to *equitable relief* as provided by Section 1501, Title 16 of the District of Columbia Code. (See *Sharon vs. Tucker*, 144 U. S. 533, and *Whitehead vs. Shattuck*, 138 U. S. 146). Appellee could then have taken a nonsuit, without prejudice, of his equitable cause of action; but in that he failed completely.

The appellee having *elected* to stand or fall upon the *equitable cause of action* alleged in the bill of complaint, his failure to show adequate grounds for *extraordinary relief* renders the equitable decree entered a clear abuse of discretion. (See *Great Lakes Dredge & Dock Company vs. Huffman*, decided by Supreme Court May 2, 1943.)

III

By the argument made at page 3, Section I of his brief,

appellee admits that a cause of action at law in ejectment was open to him at the time his alleged adverse possession of the land in dispute was *invaded* by the appellants prior to *January 23, 1941*, as shown by the proof and findings of fact; and he contends that notwithstanding the effect of his proof with respect to the actual possession of the land by appellants, he may maintain a suit in equity for *extraordinary relief* as provided by Section 1501, Title 16 of the District of Columbia Code (see *Sharon vs. Tucker, supra*).

The cases relied upon by appellee do not go so far as he insists they do, but they do establish the proposition of law that where a claimant has perfected his title to land by adverse possession, and his possession of such land be invaded by a person who claims the same adversely to appellee—a cause of action at law in *ejectment* accrues to appellee (see *Sharon v. Tucker, supra*), and not a suit in equity. The appellee's equitable remedy of an extraordinary nature (under the provisions of Section 1501, Title 16 of the District of Columbia Code), ceased to exist the moment his adverse possession of the land in dispute was invaded prior to January 23, 1941 (see R. pp. 10, 11-A and 13). The appellee slept on his *equitable rights* granted by Section 1501, Title 16 of the Code of the District of Columbia that may have existed prior to January 23, 1941.

IV

The appellee has ignored the requirements of the Federal Rules of Civil Procedure with respect to the necessity of a clear statement in his pleadings of the *essential character* of the cause of action which the proof shows he possessed; and it is not now open to him to say that the appellants possessed a right under such rules to demand a jury to try the *equitable cause of action* alleged and prosecuted

by appellee. The appellee is attempting to move *backwards in a circle*.

The appellee charted the course of the suit he *desired to prosecute* and his counsel prepared the findings of fact, conclusions of law and decree entered herein. Therefore, inasmuch as the decree entered amounts to an *abuse of discretion* under the evidence, findings of fact and conclusions of law, the appellee is not entitled to claim any rights or benefits thereunder, of an *extraordinary character*, in the teeth of the constitutional rights which it denies to the appellants. A suit in equity under the provisions of Section 1501, Title 16 of the District of Columbia Code, if sustained by proof, would not invade the constitutional rights of an adverse claimant *out of possession*; but it may not be substituted for an action at law. The equitable decree entered may not be enforced without *infringing* the constitutional rights of appellants, and they have not *waived* such rights.

CONCLUSION

The brief of appellee advances equitable principles that have at all times been denied by the Supreme Court with respect to title to land being tried in an *equitable cause of action*; and the case of *Whitehead vs. Shattuck, supra*, states the rule so clearly it is surprising that counsel for appellee would attempt to argue against the same being adhered to in his proceeding.

The Federal Rules of Civil Procedure do not purport to abolish the distinction between causes of actions in equity or at law. (See *Ettelson vs. Metropolitan Life Insurance Company*, 317 U. S. 156).

Respectfully submitted,

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